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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ISABELLO JOE RIVERA,

Defendant and Appellant.

F040283

(Super. Ct. No. 241148)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Stanislaus County. Wray F. Ladine, Judge.

Matthew H. Wilson, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Carlos A. Martinez and James B. Damrell, Deputy Attorneys General, for Plaintiff and Respondent.

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*Before Dibiaso, Acting P.J., Harris, J., and Wiseman, J.

PROCEDURAL HISTORY

On May 3, 2000, defendant was charged by information in count 1 with being a felon in possession of a firearm, in violation of Penal Code¹ section 12021, subdivision (a)(1); in count 2 with interfering in the performance of duty by an executive officer, in violation of section 69; and in count 3 with resisting arrest, in violation of section 148. With respect to counts 1 and 2, it was also alleged that defendant had two prior strike convictions within the meaning of sections 667, subdivision (d), and 1192.7, subdivision (c), and six prison priors pursuant to section 667.5, subdivision (b).

On July 27, 2001, defendant, through a plea agreement, entered a no contest plea to count 1 and admitted the two prior strike convictions and all the prior prison convictions. In exchange, it was understood that, if defendant moved to strike his strike priors, and was unsuccessful in doing so, the prosecutor would dismiss the priors alleged pursuant to section 667.5, subdivision (b), and defendant would be sentenced to 25 years to life.

Defendant later unsuccessfully moved to dismiss his strike priors and was sentenced to 25 years to life. Pursuant to the plea agreement, his denials of the section 667.5, subdivision (b), priors were reinstated and they were then stricken by the court.

FACTUAL HISTORY

The facts are taken from defendant's probation report:

"On October 18, 1999, at approximately 9 p.m., a deputy of the Stanislaus County Sheriff's Department was on patrol in Patterson, California, and observed the defendant's spouse approach him in a vehicle and saw her flashing the headlights of this vehicle. Upon contact with Mrs. Rivera, she was crying and told the deputy that the defendant was in her home, pushing

¹All further statutory references are to the Penal Code.

her around, and she wanted him out of her house. The defendant also had a \$250,000 warrant issued for his arrest. With permission from Mrs. Rivera, officers went to her home at 475 “D” Street, Patterson, and secured the perimeter of the residence. An officer went inside the residence, and saw the defendant standing in the living room of the residence approximately five feet from him. The officer directed the defendant to lie on the ground twice. After their eyes met, the defendant reached with both hands to the small of his back. He said nothing. The officer believed that Mr. Rivera was reaching for a gun and his life was at risk, and grabbed him. The defendant and officer bounced off two walls, and the defendant was able to break free as they fell to the couch. Mr. Rivera grabbed the handgun located in the back waist of his pants, but the officer grabbed him again and shook him in such a manner that he dropped the handgun. The handgun was wrapped in a red rag, and fell on the floor. While struggling on the floor, Mr. Rivera continued to make several attempts to reach for the handgun. There was a struggle that ensued for approximately one minute, and it took four officers to control and handcuff the defendant. The weapon was a Colt .45, and there was one round in the chamber and six rounds in the magazine. Mr. Rivera had two more rounds in his pants pocket.

“The defendant told the officers that he was not trying to shoot them, but that he was trying to hand the gun to the officer. The defendant claimed that he found the gun, and was going to turn it in that night because he knew the handgun was used in a homicide, and the police were looking for the gun. He was hoping that it would help him get off some of his charges. After booking the defendant, an officer checked the backseat of his patrol vehicle, and discovered a handcuff key.”

DISCUSSION

Defendant alleges his sentence violates both the state and federal prohibitions against cruel and unusual punishment. In essence, defendant contends that his conviction, although a felony, is relatively minor since it is based on his status as a felon. In addition, he attempts to minimize the facts of his case, contending they would not “ordinarily warrant a 25 year to life term.”

I. California constitutional claim

California’s Constitution, article I, section 17, provides that “[c]ruel or unusual punishment may not be inflicted or excessive fines imposed.” A sentence may violate article I, section 17, of the California Constitution if it is so disproportionate to the crime

for which it is imposed that it “shocks the conscience and offends fundamental notions of human dignity.” (*In re Lynch* (1972) 8 Cal.3d 410, 424.) The *Lynch* court set forth three techniques to use when evaluating a sentence to determine if it violates the prohibition against cruel or unusual punishment: (1) examine the nature of the offense and/or the offender, with particular regard to the degree of danger both impart to society; (2) compare the challenged sentence with punishments prescribed in the same jurisdiction for different, more serious offenses; and (3) compare the challenged punishment with punishment for the same offense in other jurisdictions. (*Id.* at pp. 425-428.)

The first portion of our analysis is essentially a two-part process. First, in conducting an inquiry of the nature of the offense, we consider “the totality of the circumstances surrounding the commission of the offense in the case at bar, including such factors as its motive, the way it was committed, the extent of the defendant’s involvement, and the consequences of his acts.” (*People v. Dillon* (1983) 34 Cal.3d 441, 479.) Second, when analyzing the nature of the offender, we focus “on the particular person before the court, and ask ... whether the punishment is grossly disproportionate to the defendant’s individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind.” (*Ibid.*)

Defendant is hardly a stranger to the criminal justice system. At the time this case occurred, defendant was in his mid-40’s. During his life, he has accumulated an impressive criminal record beginning in 1977 and spanning 14 years. Defendant’s criminal credits include convictions for second degree murder, robbery, petty theft with a prior, grand theft, receiving stolen property, several drug offenses, and possession of an illegal weapon pursuant to section 12020. In addition, defendant was free from a prison commitment for only six or seven years before the events in this case occurred.

In addition, the circumstances in this case were not minor. Defendant engaged in a struggle for several minutes with four police officers over seizure of a loaded firearm. His explanation that he was merely trying to turn the weapon (which was allegedly used

in a homicide) over to police is belied by the fact that he had two rounds in his pocket. In addition, defendant said nothing to the officers about his intentions as they struggled to subdue him following his wife's complaint that defendant had been physically abusive toward her. Based on the totality of the circumstances, defendant's arrest could have easily ended in tragedy.

We conclude that appellant's sentence is not disproportionate to punishment for more serious crimes in California or for similar offenses in other jurisdictions. The purpose of the three strikes law is to isolate people who repeatedly demonstrate a disposition toward criminal behavior for the protection of society. Defendant's 25-years-to-life sentence is not cruel or unusual in light of this offense and his lengthy history as a recidivist. His arguments to the contrary are not persuasive and are rejected.

II. Federal constitutional claim

Defendant does not provide a detailed legal analysis supporting his contention that his sentence constitutes cruel and unusual punishment pursuant to the Eighth Amendment of the United States Constitution. Suffice it to say that the United States Supreme Court has shown substantial deference toward state legislatures in devising statutes that determine what are appropriate penalties for crimes committed within the state's boundaries. (See *Ewing v. California* (2003) ___ U.S. ___ [123 S.Ct. 1179, 1187-1190]; *Harmelin v. Michigan* (1991) 501 U.S. 957, 998.) In addition, "[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." (*Id.* at p. 1001.)

Based on our analysis above, we conclude that defendant's sentence does not constitute cruel and unusual punishment under the Eighth Amendment to the United States Constitution.

DISPOSITION

The judgment is affirmed.